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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

THE STATE OF TEXAS,

Petitioner,

v.

JAMES JOSEPH WILKENS, JR.,

Respondent.

Petition For Writ Of Certiorari To The Court Of Criminal Appeals For The State Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Did the Texas Court of Criminal Appeals misapply this Court's holding in *Buchanan v. Kentucky* when it held that a criminal defendant does not waive his Fifth Amendment right to silence with respect to the admission of psychiatric testimony concerning future dangerousness during the punishment stage of a bifurcated capital murder trial when he requests pre-trial psychiatric examinations and presents testimony in support of his claim during the guilt/innocence stage of the trial?

(2) Did the Texas Court of Criminal Appeals misapply the harmless error analysis of *Chapman v. California* and *Satterwhite v. Texas* by ignoring the critical evidence admitted during the guilt/innocence phase of the trial?

PARTIES TO THIS PROCEEDING

The names of the parties to this proceeding are as follows:

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2. James Joseph Wilkens, Jr., TDCJ# 000897, Texas Department of Criminal Justice, Institutional Division, Ellis I Unit, Huntsville, Texas 77343 (Respondent)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals for the State of Texas entered in this proceeding on November 4, 1992.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas is reprinted in the appendix to this petition. This opinion is scheduled for publication after the mandate is

released, but to date it has not been published. This is the only decision in this cause.

STATEMENT OF JURISDICTION

The opinion and judgment of the Court of Criminal Appeals were entered on June 10, 1992. A timely motion for rehearing of that decision was overruled on November 4, 1992. The decision to deny rehearing is reprinted in the appendix to this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a). This petition is timely filed pursuant to United States Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fifth Amendment provision that "no person shall be compelled in any criminal case to be a witness against himself", which applies to Texas through the Fourteenth Amendment, is involved in this case. Also, the Sixth Amendment provision that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense", which applies to Texas through the Fourteenth Amendment, is implicated in this case.

STATEMENT OF THE CASE

A. Statement of the Facts

The evidence in this case revealed that the respondent and Sandra Williams met in July 1986 at the Pitt Grill where she was a waitress and he was a cook (SF XXIV-60). Sandra lived with friends, and the respondent lived with a man named Richard Wood (SF XXIV-64). Sandra and the respondent started dating each other and soon thereafter the respondent moved into Sandra's trailer house (SF XXIV-61). Their relationship quickly soured, however, when the respondent became extremely jealous of Sandra's little boy, four year old Larry McMillan, Jr. The respondent was even more jealous of Sandra's friendship with Richard Wood, the respondent's former roommate (SF XXIV-78-81). The respondent also became angry because Sandra injured herself at work and she depended on the respondent for assistance in dressing and bathing (SF XXIV-76). The respondent moved out of the trailer house (SF XXIV-82). The respondent's feelings for Sandra did not end with the cessation of their relationship, however. The respondent continued to have jealous feelings about Sandra and Richard. The respondent repeatedly tried to visit Sandra (SF XXV-16). She observed him driving around the trailer park (SF XXV-19). He made threats against both Sandra and Richard (SF XXIV-88). In the meantime, Sandra discovered that she was pregnant by the respondent (SF XXIV-93). At one point the respondent slapped Sandra and told her he would make sure she didn't have the baby (SF XXIV-90; XXV-13).

Just after Christmas on December 27, 1986, Richard, Sandra, and young Larry returned from a trip to Arlington, Texas, where they retrieved Larry from his grandmother's home. They arrived in Tyler at approximately 9:22 p.m. that evening. Sandra carried Larry into

the house and placed him on a couch (SF XXIV-114). Sandra went to the bathroom. As she was standing in the bathroom, she noticed the respondent hovering near her, holding a rifle (SF XXIV-119). She screamed and ran out the front door of the trailer (SF XXIV-121). As she ran out the trailer, she passed Richard in the hallway and he told her to get help (SF XXIV-122). Sandra heard two or three shots go off as she was running out the door and saw Richard fall to the ground (SF XXIV-122). As she was trying to flee to the neighbor's house for help, the respondent shot her in the back (SF XXIV-125). Sandra fell down.

At that time, she heard little Larry screaming from the trailer (SF XXIV-127). Despite the fact that she had been wounded, Sandra got up and ran back to the trailer. The respondent turned from where he was standing, pointed the gun at Sandra, and shot her again (SF XXIV-129). From where Sandra was sprawled on the ground, wounded from the two blasts, she heard her young son "screaming like he had never screamed before" (SF XXIV-130). Sandra feigned death, hoping that the respondent would leave (SF XXIV-130). Instead, she heard between six and eight shots fired from the gun (SF XXIV-131). Larry was silent after that (SF XXIV-132).

Sandra survived the attack, but she suffered thirteen perforations of her small intestine (SF XXIV-48).[1] Larry and Richard died. A pathologist who performed autopsies on the bodies, Dr. V.V. Gonzalez, later testified that

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[1] Miraculously, the bullet did not injure Sandra's uterus or the fetus (SF XXIV-48).

Wood had been killed by a gunshot wound to his face (SF XXVIII-111, 112). Dr. Gonzalez testified that Larry had been killed by multiple gunshot wounds to his chest and eyebrows (SF XXVIII-140). Dr. Gonzalez estimated that Larry had been shot at least six times but possibly as many as eight times (SF XXVIII-134-135). The spray of the ammunition apparently made an exact determination of the number of wounds impossible.

The respondent pled not guilty by reason of insanity. The two doctors who examined him before the trial determined that he was competent for purposes of trial. The jury subsequently convicted the respondent of capital murder. The jury also returned answers of "yes" to the special issues required by Article 37.071, Texas Code of Criminal Procedure. Because of these answers, the trial court assessed the mandatory death penalty.

B. Course of Proceedings and Disposition in the Courts Below

The Court of Criminal Appeals reversed the respondent's conviction in *Wilkens v. State*, No. 70,136 (slip op.) (June 10, 1992) (attached as Appendix "A"). The State filed a motion for rehearing, which was denied on November 4, 1992 (attached as Appendix "B"). Although the only error in the trial was contained in the punishment phase, the laws of Texas require that the entire case must be retried.

REASONS FOR GRANTING THE WRIT

The Court of Criminal Appeals reversed the death sentence of the respondent for the murders of Richard Wood and Larry McMillan, Jr. because the Court determined that the testimony of Dr. Tynus McNeel and Dr. Tom Allen should not have been admitted during the punishment phase of the trial. The doctors interviewed the respondent before the trial started because the respondent contended that he was not competent to stand trial and he requested these interviews. Both doctors testified during the guilt/innocence phase of the trial and the punishment phase of the trial. Their testimony in the punishment phase of the trial addressed the respondent's potential for future dangerousness.[2]

This decision warrants review by this Court for two reasons. First, the Court of Criminal Appeals misapplied this Court's holding in *Buchanan v. Kentucky*, 107 S. Ct. 2906 (1987). Second, the Court of Criminal Appeals misconstrued the harmless error doctrine of *Chapman v. California*, 386 U.S. 18 (1967) and *Satterwhite v. Texas*, 486 U.S. 249 (1988).

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[2] One of the special issues in Article 37.071, Section 2(b)(1), is whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society".

ARGUMENT AND AUTHORITIES

I. IN DETERMINING THAT THE ADMISSION OF PSYCHIATRIC EVIDENCE DURING THE SENTENCING PHASE OF THE TRIAL ON THE ISSUE OF FUTURE DANGEROUSNESS WAS ERROR, THE TEXAS COURT OF CRIMINAL APPEALS MISAPPLIED THIS COURT'S HOLDING IN *BUCHANAN V. KENTUCKY*.

The Texas Court of Criminal Appeals recently reversed the death sentence given to the respondent, largely on the basis of *Buchanan v. Kentucky*, *supra* and *Powell v. Texas*, 742 S.W.2d 353 (Tex. Crim. App. 1987), vacated and remanded, 108 S. Ct. 2891 (1988), *aff'd*, 767 S.W.2d 759 (Tex. Crim. App. 1989), *rev'd*, 109 S. Ct. 3146 (1989). The opinion also cites *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981). The genesis of these cases is *Estelle v. Smith*, 101 S. Ct. 1866 (1981), in which this Court first held that a defendant's Fifth Amendment right to silence is violated when he is interviewed by mental health professionals without receiving a *Miranda* warning.[3]

The respondent in this case claimed initially that he was mentally incompetent to stand trial; once he was found competent and the trial proceeded, he then offered an insanity defense throughout the trial (T-18; T-33; T-44; SF XXX-14). Before the trial, the respondent requested two examinations by mental health experts (T-18). These professionals determined that the respondent was competent to stand trial and that he was sane at the time of the offense. Consequently, the State called both experts to testify during the guilt/innocence stage of the trial and also at the punishment stage of the trial. Their testimony during the guilt/innocence phase of the trial centered on the issue of the respondent's sanity. Dr. McNeel, a

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[3] See *Miranda v. Arizona*, 86 S. Ct. 1602 (1966).

psychiatrist, testified that the respondent was sane at the time of the offense.[4] The respondent told Dr. McNeel

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[4] The following are excerpts from psychiatrist Dr. Tynus McNeel's testimony at the guilt/innocence phase of the trial:

"Q [by Mr. Henry] Did you ask him anything about the child that was shot?

A I asked him about the child and his response was, 'They said Larry got shot also'. That was the four-year-old son of the woman, I believe. And then he said, 'I don't remember shooting Larry' " (SF XXXI-13).

"Q [by Mr. Henry] What types of things was he talking to you about?

A . . . . I then asked him if he would do this all over again if he had an opportunity and he said, 'I don't know,' unquote. He said, 'I think probably not'. He said, 'I want them to kill me,' unquote. 'I'm tired of hurting,' unquote. And that was the end of the conversation.

Q Now, Doctor, he told you about hearing these voices?

A Yes, sir.

Q Now, can you tell us whether or not in your area of expertise can you tell us whether or not you believe the Defendant was being truthful to you about having these hallucinations?

A No, my opinion is that he was not being truthful about having hallucinations and hearing these kind of voices at the time.

Q . . . . Why do you say that he was not being truthful about these hallucinations?

A Well, for a variety of reasons. One is that he didn't bring these up at the time he was telling about the actual shooting. This was sometime later in the conversation, almost like an afterthought. Another reason is that these things that he says he heard don't really make much sense to me. . . . Other reasons are that when you think of a person with a mental illness that is severe enough to have auditory hallucinations where they actually hear voices or see things that are not there or hear things that are not there. . . . you think of a diagnosis of

that he did not remember shooting the boy, and also that "voices" compelled him to commit the crime. Dr. McNeel further testified that he doubted the respondent's truthfulness. Dr. Thomas Allen, a psychologist, also testified that the respondent was legally sane at the time of the offense. He further testified that the respondent tried to mislead him and that the respondent was manipulative.[5]

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schizophrenia. . . . So, there is no evidence . . . that he had had an illness . . . called schizophrenia or anything close to that type of diagnosis where a person would have auditory hallucinations" (SF XXXI-15-17).

[5] The following is from Dr. Thomas Allen's testimony:

"Q [by Mr. Henry] What did you find to be the main theme of the Defendant's conversation with you? What was he talking about mostly?

A . . . . There was what I called in my report a theme of self-pity and projected anger and blame, blaming everybody and taking no responsibility himself. . . . " (SF XXXI-75).

"Q And you gave the Defendant [sic] MMPI test?

A Correct.

Q Now, what did he do on that test?

A Well, he produced an invalid profile because of the exaggeration of psychopathology.

Q What did you conclude from that?

A That, number one, the test is invalid because he wasn't honest on it.

Q Well, why was it invalid? In what way was he not honest?

A He told – he responded in a way which emphasized a lot of inconsistent, irrational and exaggerated complaints. He produced elevations on all eight clinical scales. His complaints were hypochondriacal. They were depressed. They were histrionic. They were psychopathic. They were paranoid. They were schizophrenic. If he were as sick as the profile would suggest, if I believed the profile,

This testimony was introduced during the guilt/innocence stage of the trial. At the punishment phase of the

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I mean, he wouldn't be able to crawl. I mean, that's extremely sick. And statistically people scoring in that range that he scored in don't produce that kind of profile by chance. He answered questions in a way which exaggerated illness, both medical and psychological. He answered a lot of items on what is termed the F scale which are very strange which people don't ordinarily answer true to. Items, if I can use an analogy, like my teeth itch, true.

Q . . . So are you saying that you concluded from that test that the Defendant was exaggerating or giving you or showing you symptoms of mental illness that couldn't possibly have been there?. . . .

A What I concluded was he answered the test in a way that he hoped would make him look sick, mentally ill.

Q Did it?

A No.

Q Okay. Why not?

A Because even people who are mentally ill don't produce profiles that are that elevated. If they can read the items, they do not produce profiles that are that elevated." (SF XXXI-81-82).

"Q What does that tell you?

A It tells me the way he answered the test was preposterous. He was not being honest with me. He was reporting things that do not exist, everything from I have a tummy ache to evil spirits possess me. Every possible complaint on that test he answered true, I have that.

Q Now, based on your testing and your interview with the Defendant and his talk of hallucinations and his test results, what was the Defendant trying to do with you?. . . .

A Well, I believe that in terms of presenting an honest picture to me, he was being manipulative. . . . The point I made in my report was that my opinion is his behavior is not driven by hallucinations or delusions. It's not driven by voices that he hears. It's driven by his desire to be manipulative, to take

trial, both doctors testified that the respondent would constitute a continuing threat in the future.

The Court of Criminal Appeals concluded that the testimony by the two mental health professionals at the punishment phase of Wilkens's trial violated his Fifth Amendment rights against self-incrimination.[6] *Wilkens, supra* at 11. Although *Powell* and *Buchanan* do not directly address the narrow issue in the present case, the Court of Criminal Appeals concluded that these cases indicate that a "lack of notice and a lack of waiver by the appellant at the punishment phase [of a capital murder trial] also violate[s] appellant's Fifth Amendment rights at the punishment phase". *Wilkens, supra* at 8. The Court of Criminal Appeals also noted that "the State cannot use an expert who has examined the defendant for sanity and competency to testify to future dangerousness on the basis of

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advantage of people. . . . He will tell lies to get what he wants. He will break the rules. He cannot – he does not conform his behavior to social rules and conduct, not because he can't but because he doesn't want to. He will take advantage of people. He will take advantage of people who try to help him. He will take advantage of people he doesn't even know" (SF XXXI-83-85).

"Q Now, how do you characterize this Defendant?. . . .

A I characterize him as an antisocial personality". . . . (SF XXXI-86-87).

"Q Did you talk to the Defendant about the child? When you asked him about shooting the child, what did he say to you about that?. . . .

A Nothing" (SF XXXI-90-91).

[6] This Court determined that the appellant waived his Fifth Amendment right regarding the mental health testimony during the guilt/innocence stage of the trial. *Wilkens, supra* at 7.

that examination absent a defendant's waiver of his Fifth Amendment privilege at the punishment phase". *Wilkens, supra* at 11.

The decision reached by the Court of Criminal Appeals is erroneous, however, for several reasons. First, the Court of Criminal Appeals has misapplied the holdings of *Powell* and *Buchanan*. In *Buchanan, supra,* this Court set forth the following proposition: "if a defendant requests such an evaluation or presents psychiatric evidence, **then, at the very *least***, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have *no* Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution". *Buchanan, supra* at 2917-2918 (emphasis added) (citations omitted). The present case is similar to the *Buchanan* situation because here the respondent requested psychiatric examinations and he introduced evidence in support of his insanity defense.

The Court of Criminal Appeals held that the *Buchanan* holding of waiver does not apply to the sentencing phase of a capital murder trial. That is an interesting conclusion, considering that the language of *Buchanan* with respect to waiver is broad and unequivocal. This Court explicitly stated that once a defendant raises a mental health issue in the trial, he no longer has a Fifth Amendment privilege with respect to testimony based on a psychiatric interview that the defendant requested. *Buchanan, supra.* The waiver in *Buchanan* would seemingly encompass the second part of a bifurcated trial. It is difficult to understand how a defendant may only "partially" waive his right to remain silent. If the evidence

may be used against him at the guilt/innocence stage of the trial, it seems fair that the evidence should be used at the sentencing stage of the trial.

There are critical factual differences between the present case and the *Powell* case. The *Powell* court specifically declined to comment upon the issue present in this case.[7] In *Powell*, the defendant was interviewed by a psychiatrist and a psychologist **at the State's request**. *Powell, supra* at 3148. Powell's counsel was not notified and Powell was not informed of his right to remain silent. The State called both to testify during the sentencing phase of the trial. These facts are quite different from the facts in the present case because the respondent in this case initiated both interviews. His counsel was on notice and he effectively waived his right to remain silent. Although the Texas Court of Criminal Appeals cited a footnote from *Powell*, this Court did not reach the issue present in this case. *Powell* is much more factually similar to *Estelle v. Smith, supra*, in that the defendant did not request the interviews and did not receive *Miranda* warnings. The defendant in *Powell* never waived his right to remain silent as did the respondent in the present case. The Court of Criminal Appeals erred in relying on *Powell*, because the differences between the present case and *Powell* are dispositive.

Another case relied upon and misapplied by the Court of Criminal Appeals is *Battie, supra*. Battie

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[7] This Court noted, "We . . . have no occasion to address whether a waiver of the right to object to the use of psychiatric testimony at the guilt phase of a capital trial extends to the sentencing phase . . . " *Powell, supra* at 3149 (n.2).

requested a mental health interview for the purposes of determining his competency to stand trial and to determine his sanity at the time of the offense. A psychiatrist and a psychologist interviewed him. Battie never introduced testimony of mental health experts at trial on the issue of a mental state relevant to the offense, however. Neither the State nor the defense called the psychologist to testify during the guilt/innocence phase of the trial. The State presented the testimony of the psychologist during the sentencing phase of the trial, however, who testified that Battie would constitute a continuing threat to society. This testimony was based on the interview requested by Battie. Because Battie did not introduce a mental health defense, the Fifth Circuit held that the waiver doctrine was inapplicable. *Battie, supra* at 702.

The *Battie* court recognized that when a defendant presents a mental health defense, he effectively waives the Fifth Amendment privilege "in the same manner as would the defendant's election to testify at trial". *Battie, supra* at 701-702. The *Battie* court also cited *United States v. Cohen,* 530 F.2d 43 (5th Cir.), *cert. denied,* 97 S. Ct. 149 (1976). *Cohen* upheld the government's use of the results of a court-appointed psychiatric examination after the defense presented testimony in support of a mental health defense. As the Fifth Circuit noted, "*Cohen,* like virtually every other federal and state court to address this issue, concluded that any burden imposed on the defense by this result is justified by the State's overwhelming difficulty in responding to the defense's psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses". *Battie, supra* at 702.

The Court of Criminal Appeals also failed to mention its decision in *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 834 (1986), later proceeding *Penry v. Lynaugh, cert. granted* (on separate grounds), 108 S. Ct. 2896 (1988) (*rev'd* on other grounds), 109 S. Ct. 2934 (1989). *Penry* held that the State was properly allowed to introduce the testimony of two psychiatrists during the sentencing stage of the trial, both of whom had previously interviewed Penry for competency at the defendant's request. *Penry, supra* at 650-652. The Court of Criminal Appeals concluded that Penry waived his constitutional right against self-incrimination because he raised the issue of insanity during the guilt/innocence stage of the trial. *Penry, supra* at 652.[8]

When a defendant waives the Fifth Amendment right and makes a statement, the State should be able to use that statement for all purposes. For instance, if a defendant waives his Fifth Amendment right and confesses a crime to a law enforcement officer, that confession should be admissible during every stage of a trial. Once waiver has been established for the interview itself, the answers to that interview and every possible inference that may be read into the answers to the interview should be

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[8] One of the cases relied upon by the Court of Criminal Appeals as to the distinction between waiver in the guilt/innocence phase of trial and waiver in the sentencing phase of the trial, *Beathard v. State*, 767 S.W.2d 423 (Tex. Crim. App. 1989), even mentions and distinguishes *Penry*. *Beathard, supra* at 432. The Court stated, " . . . our holding in *Penry* [that waiver applies to both stages of the trial] is applicable only within the limited area of psychiatric examinations and *Estelle v. Smith* error." *Beathard, supra.*

properly admitted into evidence. There is no analytical distinction between waiver for the guilt/innocence phase of the trial and waiver for the sentencing phase of the trial. The waiver should be in effect for all uses throughout the proceedings in the cause.

Further, the Court of Criminal Appeals' opinion does not represent the logical extension of *Buchanan*, *Powell*, and *Battie*. These cases stand for the idea that once a defendant initiates the question of culpability through a request for mental health interviews and the presentation of mental health testimony, he has waived his constitutional right to remain silent. The content of the interview of a defendant by a mental health professional, initiated at the defendant's request, should be available for all purposes. To restrict the use of the testimony unnecessarily burdens the State and obstructs the fact-finding function of the trial.

II. IN DETERMINING THAT THE DOCTORS' TESTIMONY ON FUTURE DANGEROUSNESS WAS NOT HARMLESS ERROR, THE COURT OF CRIMINAL APPEALS ERRED BY MISAPPLYING THE HARMLESS ERROR RULE OF *CHAPMAN V. CALIFORNIA* AND *SATTERWHITE V. TEXAS*.

This Court has determined that the harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in *Estelle v. Smith*, *supra*, where it noted that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected the capital sentencing jury. *Satterwhite*, *supra* at 1798. The harmless error rule is that if the prosecution

can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, then the error is harmless and the verdict may stand. *Chapman v. California, supra* at 828. Thus, the question in the case at bar is whether the State has proved beyond a reasonable doubt that the doctors' testimony did not contribute to the verdict.

In the Court of Criminal Appeals' decision, the Court held that the State could not prove beyond a reasonable doubt that the doctors' testimony did not contribute to the verdict and reversed the death sentence given to the respondent. The State contends, however, that the Court of Criminal Appeals misapplied the federal harmless error rule of *Chapman v. California, supra* and *Satterwhite, supra*, and that no reversal is necessary in this case.[9]

THE COURT OF CRIMINAL APPEALS INCORRECTLY EVALUATED THE STANDARD OF HARMLESS ERROR.

The State contends that the Court of Criminal Appeals incorrectly evaluated the harm of the error committed. The Court of Criminal Appeals concluded that there had been "no showing" that the "jury was convinced of appellant's future dangerousness without the aid of" Dr. McNeel's and Dr. Allen's testimony. *Wilkens,*

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[9] The state court opinion cited federal harmless error cases and the opinion did not clearly state that it was relying exclusively on state law. Thus, it must be presumed that the court's opinion rested on federal law. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

supra at 12. The Court of Criminal Appeals relied on this Court's decision in *Satterwhite, supra,* in employing this analysis. The result of this decision is a confusing standard on harmless error. It is the position of the State that the standard enunciated is faulty; and that this standard, which can never be met by the State, produces an unjust and judicially inefficient result.

In past decisions, this Court construed its harmless error standard to mean that if the evidence in the trial was overwhelming or cumulative, the error committed was "harmless" and the conviction would be upheld. *Rose v. Clark,* 478 U.S. 570 (1986); *Delaware v. Van Arsdall,* 475 U.S. 673 (1986); *Milton v. Wainwright,* 407 U.S. 371 (1972); *Schneble v. Florida,* 405 U.S. 427 (1972). These cases have never been overruled; *Satterwhite* did not mention them. This Court recognized that the purpose behind the harmless error rule was the promotion of economic and judicial efficiency. As this Court noted in the *Van Arsdall* decision:

> "The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Supra* at 681.

In *Satterwhite,* this Court shifted its emphasis of harmless error from examining the error in the context of the weight of properly admitted evidence, back to the scope and impact of the erroneously admitted evidence. This is a significant departure, because it requires the

State to prove a negative – that the error did not irreparably taint the proceedings. This Court did not overrule its previous decisions which permitted the courts to examine the error in the context of the other evidence, nor did it provide any real guidelines for fleshing out this new standard. In fact, *Satterwhite* stands alone as an aberration and an anomaly to this Court's other opinions on harmless error. In turn, the Court of Criminal Appeals interpreted *Satterwhite* as requiring an inquiry into the singular impact of the doctors' testimony on the jury.

The State contends that this is the wrong inquiry. First, it is impossible to know the effect of one specific piece of evidence or witness on the jury. The jury is not permitted to reveal any of the deliberative or mental processes it used in reaching its verdict. Thus, the State can never satisfactorily meet this burden. The entire purpose behind the harmless error rule, judicial efficiency, is defeated if the analysis used is so demanding that the State can never meet it.

This is also an inefficient and unjust standard. By focusing on the error and its potentially endless ramifications, the Court ignores all of the other evidence which obviously indicates that the respondent was guilty. Lost in this analysis is the idea that a criminal trial is a process that is designed to produce a reliable and fair result. The fairness of a trial is not impaired by a constitutional error that had no effect on the finding of guilt. See *Strickland v. Washington*, 466 U.S. 668 (1984). Also lost in the Court of Criminal Appeals' analysis is the concern for public respect of the criminal appellate process, which was expressed by this Court in the *Van Arsdall* decision.

IN DETERMINING THAT THE DOCTORS' TESTIMONY ON FUTURE DANGEROUSNESS WAS NOT HARMLESS ERROR, THE COURT OF CRIMINAL APPEALS ERRED BY IGNORING THE EVIDENCE PROPERLY ADMITTED DURING THE GUILT/INNOCENCE PHASE OF THE TRIAL.

At the punishment stage of the trial, prosecutors asked the jury to consider all the evidence admitted during the guilt/innocence stage of the trial. Yet, the Court of Criminal Appeals ignored the obvious impact of this devastating and critical testimony in determining that the doctors' testimony terminally tainted the trial. The State contends that this evidence deserves the Court's attention and should not be summarily dismissed. The Court of Criminal Appeals found nothing wrong with any of the evidence or proceedings of the guilt/innocence phase of the trial. Indeed, a plethora of evidence was presented during the guilt/innocence phase of the trial which is more than sufficient to support the jury's findings and verdict. Further, the State argues that the evidence properly admitted during both phases of the trial was so overwhelming and cumulative that, beyond a reasonable doubt, the tainted evidence, which in contrast is rather insignificant, did not contribute to the jury's verdict.

Texas law certainly does not require the admission of psychiatric testimony in a capital murder trial. In addition to the evidence that was presented to the jury in the penalty phase, the jury is allowed to take into consideration all the evidence submitted, including the evidence in the guilt stage, in determining what penalty to assess against the respondent. *Pyles v. State*, 755 S.W.2d 98 (Tex. Crim. App. 1988). The circumstances of the offense, if

severe enough, can be sufficient for an affirmative answer to the question of future dangerousness. *Landry v. State*, 706 S.W.2d 105 (Tex. Crim. App. 1985); *Holloway v. State*, 691 S.W.2d 608 (Tex. Crim. App. 1984). In fact, the facts and circumstances surrounding a murder may be more probative than any other evidence regarding the issue of future dangerousness presented at the penalty phase of the trial. *Kunkle v. State*, 771 S.W.2d 435 (Tex. Crim. App. 1986).

There is ample evidence to prove beyond a reasonable doubt that the error of admitting the doctors' testimony did not contribute to the verdict in the respondent's case. Many differences exist between respondent's case and *Satterwhite*, which seems to be the basis for the Court of Criminal Appeals' decision. For instance, the doctors never referred to the respondent as a "sociopath". This was a key term Dr. Grigson employed in testifying in *Satterwhite*. In this case, the doctors' testimony during the punishment phase of the trial focused on the respondent's violent tendencies and his potential for rehabilitation.[10] Another fact which distinguishes this

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[10] The following are excerpts from Dr. McNeel's testimony during the punishment stage of the trial:

"Q [by Mr. Henry] What is your opinion . . . as to whether or not there is a probability that this Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

A Well, in my opinion, based on information I have had available to me and my experience in my field, I feel that there definitely is a probability of future acts of violence in a person like this" (SF XXXIII-28-29).

"Q . . . . Doctor, did the Defendant give you any indication of remorse . . . over these killings?

A I would have to say very little. . . .

case from *Satterwhite* is the closing argument by prosecutors. The prosecutors in *Satterwhite* unduly emphasized Dr. Grigson's testimony, and repeated the word

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Q .... [C]an you tell us what kind of chances the way things are today that this Defendant has of being rehabilitated?

A Well, if being rehabilitated means basically curing or changing the basic personality default or defect. . . . I think there's no one in psychiatry that feels like that this is a condition that is likely to be improved or likely to respond to treatment or basically is untreatable in any reasonable manner.

Q .... Doctor, you asked the Defendant the question when you were interviewing him if he would do this again and how did he respond in manner and speech to that? What was his reaction to that?

A Well, he paused and hesitated for some time, I suppose some thirty seconds as though he was reflecting on it, and finally he said – as I recall, he said, 'I don't think I would or I get' – no, I'm sorry. He said, 'I guess I wouldn't do it again,' and then went on to discuss some other topic. . . . " (SF XXXIII-32-34).

The following excerpts are from Dr. Allen's testimony during the punishment stage of the trial:

"Q Now, Doctor, based on your examination of the Defendant and based on the materials that were provided to you and that you were able to read through, were you able to form an opinion as to whether or not there is a probability that this Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

A Yes.

Q And what was that opinion?

A That he is a threat to – that there is a probability that he will continue to be a threat to society to commit criminal acts. . . . " (SF XXXIII-79).

"Q Now, when you were talking to the Defendant, Doctor, did he express any remorse to you or did you detect any remorse on his part for killing these people?

A No. No, I did not. . . . " (SF XXXIII-86).

"sociopath" several times during the argument. The prosecutors in the present case emphasized the facts of the crime, and the testimony of Dr. Crow which was admitted during the guilt/innocence phase of the trial.[11]

"Q At this point in time, knowing what the Defendant has done, knowing what he's been convicted for in this court today, what are in your opinion his chances for rehabilitation?

A Minimal" (SF XXXIII-88).

[11] The following are excerpts from Assistant District Attorney Kevin Henry's portion of the closing arguments during the punishment phase of the trial:

> ". . . . Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society? Now, let's look at what he is. And instead of just starting with Dr. McNeel and Dr. Allen, let's go back to Dr. Crow in the guilt stage of the trial when he was describing this Defendant as an antisocial personality. . . . Both doctors testified that this type of thing is something that cannot be treated, cannot be made to go away, cannot be changed. . . .
>
> Now, Dr. Allen testified why he thought the Defendant would be a future danger, why the probability was there, why he said there was a high probability. Severe [sic] factors came together and, folks, you know it from the evidence. You know from seeing those past reports at Rusk. You know that this Defendant has been attempted to be helped many, many times in the past. He's been in the penitentiary before. That didn't do any good. He's been in Rusk State Hospital before and that didn't do any good. And now it all culminates with this gruesome double murder, a horrible act at the hands of this Defendant" (SF XXXIII-163).

The State contends that the facts of this case distinguish it from the *Satterwhite* case and is alone indicative

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Although Mr. Henry mentioned the doctors' testimony, he hardly emphasized it.

Smith County District Attorney Jack Skeen, Jr., made the following references to the doctors' testimony during his portion of the closing arguments at the punishment stage of the trial:

> "What I ask you to look at is what is the testimony regarding the Defendant in this case. And what I ask you to base that on is, number one, what this Defendant has done. You know. You know, I don't think that we could find any finer witness than Dr. Thomas Allen to come in here and testify and Dr. McNeel to come in here and testify. This is a psychiatrist and a psychologist who have closely examined this Defendant. And if you look at the testimony of Thomas Allen, Dr. Allen, what does he tell you? There is a high probability that this Defendant will commit future acts of violence against society. That's what his testimony is. That's the bottom line on it. He told you the basis of all of it and he spent five hours with this Defendant . . . " (SF XXXIII-183-184).
>
> " . . . And I would submit to you, ladies and gentlemen, that if you did not have the testimony of Dr. Thomas Allen and if you did not have the testimony of Dr. Tynus McNeel that you could make a real good case just based on the actions of this Defendant that there is a probability that this Defendant will commit future acts of violence against society. And when the defense attorney stands up here and says all they've brought you is the testimony of Dr. Allen and Dr. McNeel, he couldn't be more wrong. The Judge instructs you right here in this charge that in making a determination of how any of these special issues should be answered you could consider all the evidence in the case. All the evidence produced in the full trial can be considered in determining how this

of future dangerousness. This was a brutal crime inflicted upon an unsuspecting man, woman and child. The jury found the respondent guilty of this heinous crime. While the State produced a psychiatrist and a psychologist to testify, this was not necessary to sustain a conviction.[12] The evidence properly admitted during both phases of the trial was so overwhelming and cumulative that, beyond a reasonable doubt, the tainted evidence, which in contrast is rather insignificant, did not contribute to the jury's verdict. This Court should remember that the respondent testified and basically admitted that he committed the crime (SF XXX-78, 79). The respondent also admitted that he robbed a gas station in Amarillo, Texas, in 1982, with a knife, and was subsequently convicted of robbery (SF XXX-35, 95-97). The only issue was his culpability, since he raised the mental health issues.

Since the facts of this case alone would have been sufficient to support an affirmative answer to the second

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> special issue No. 2 and the others should be answered. You just ask yourselves from a common-sense standpoint. I really don't think you have to have a bunch of degrees and having done the type of work that Dr. McNeel and Dr. Allen have done, even though certainly they're the type trained professionals that can give that opinion, but I don't think you have to go exclusively on that" (SF XXXIII-185-186).

The thrust of Mr. Skeen's argument is obviously that the facts of the crime alone warrant the death penalty.

[12] Psychiatric testimony is not essential to support an affirmative answer to the question of future dangerousness. *Carter v. State*, 717 S.W.2d 60 (Tex. Crim. App. 1986); *Mitchell v. State*, 650 S.W.2d 801 (Tex. Crim. App. 1983); *Williams v. State*, 668 S.W.2d 692, 695 (Tex. Crim. App. 1983).

issue if the doctors had not testified, it can hardly be said that their testimony added anything to the jury's decision. A psychiatrist or a psychologist is not required to determine that a person who would murder a man and a small child as they were bringing in their Christmas presents, and who would attempt to murder the mother of the small boy as she tried to help her son and as she tried to dodge the spray of bullets, is a deviant who should be removed from civilized society. By disregarding the evidence of the crime itself, the Court of Criminal Appeals not only miscalculated the federal harmless error standard but it has also callously ignored the pain and suffering endured by Sandra and her family. A retrial will be excruciatingly difficult for Sandra Williams and the family of Richard Wood. Sandra Williams will be forced to relive that horrifying instant when the killer appeared in her bathroom, she ran for help, she saw her friend shot in the face with a shotgun and die, she heard her son screaming for help and the shotgun blasts that ended his life, and the tense moment when she knew her son was dead and she had to lie on the ground and "play dead" in hopes that the respondent would not shoot her again. Such a result is not fair, nor just, and it is certainly not mandated by the Constitution.

The State maintains that this Court should revisit the harmless error standard. The State urges this Court to adopt a more fair and equitable standard for determining harmless error. Absent the doctors' testimony, there was ample evidence properly admitted that can sustain the verdict reached in this case. The evidence supporting the affirmative finding of future dangerousness is compelling and overwhelming. Because of all the evidence the jury

heard, this Court should grant the State's petition, and determine that the State proved beyond a reasonable doubt that the erroneous admission of the psychiatric testimony did not contribute to the verdict of death. Because the harmless error rule applies in this case but was misapplied by the Court of Criminal Appeals, this Court should review the doctrine of harmless error and remand this cause to the Court of Criminal Appeals. The sentence of death should be affirmed.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case. The judgment of the Court of Criminal Appeals should be reversed and the case should be remanded to that court, for further proceedings.

Respectfully submitted,

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JAMES JOSEPH WILKINS, JR., Appellant

NO. 70,136 v.----- Appeal from SMITH County

THE STATE OF TEXAS, Appellee

OPINION

James Joseph Wilkens, Jr., appellant, was indicted for the offense of capital murder in the shooting deaths of Richard Wood and Larry McMillen, Jr. both having been committed during the same criminal transaction on or about December 27, 1986 in Smith County, Texas. Appellant was convicted and sentenced to death on or about February 18, 1988. This is appellant's direct appeal of this verdict wherein he raises twelve points of error.

Appellant does not raise sufficiency of the evidence, and so a detailed recitation of the facts is not necessary. Briefly, he is accused of going to the home of Richard Wood on December 27, 1986 with a .22 rifle and immediately opening fire on all present. Richard Wood was shot in the face and left dead in his doorway. Sandra Williams, a former girlfriend of appellant's, was shot several times in the front yard while attempting to run from appellant; however, she lived. Larry McMillen, Jr., a four year old child of Sandra Williams, was killed by multiple shots while sitting on the living room sofa. Appellant plead not guilty by reasons of insanity. He was examined by two doctors for his mental competency to stand trial and was found competent for purposes of trial.

Appellant's points of error may be categorized into three groupings. Points of error two, three, four, and ten all complain of the testimony at the penalty phase by Drs.

Tynus McNeel and Thomas Allen; particularly, on future dangerousness and the State's failure to notify defense in advance that their examinations would be used for future dangerousness, as well as Dr. McNeel's status as an expert.

Points of error five through eight all complain of the admitting of certain photographs of the two victims, all of which appellant alleges were highly prejudicial and inflammatory and had little or no probative value.

Points of error one and nine complain of error in the charge; and points eleven and twelve complain of improper bolstering and of the capital sentencing procedure as it relates to mitigating evidence.

Points two and three pertain to testimony at the penalty phase by Dr. Tynus McNeel and Dr. Thomas Allen about appellant's future dangerousness. Appellant argues that such testimony violated his Fifth Amendment privilege against compelled self-incrimination because neither doctor had informed him of his right to remain silent and that anything he said could be used against him. See *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In point of error four, appellant contends his Sixth Amendment right to counsel was violated by the State's failure to first notify his counsel that the psychiatric and psychological examinations would encompass the issue of future dangerousness upon which McNeel and Allen testified.

Prior to trial appellant's counsel requested that the trial court appoint an expert to examine appellant concerning his competency to stand trial. His motion also stated that appellant suffered from mental diseases and

defects in the recent past. In addition, counsel filed a notice of intent to raise the defense of insanity. The trial court appointed McNeel to examine appellant on the issues of incompetency to stand trial and insanity at the time of the offense. Later, the trial court granted counsel's request to appoint Allen to examine appellant on the issue of competency. Again the court's order included a provision ordering Allen to also examine appellant on the issue of sanity at the time of the offense.

Both McNeel and Allen testified for the State in rebuttal during the guilt/innocence phase of trial concerning appellant's sanity. At the punishment phase of trial McNeel and Allen testified for the State that, based upon their examinations of appellant, there was a probability he would commit future acts of violence. Appellant objected to this testimony on the basis that neither McNeel nor Allen had informed him of his right against self-incrimination and that anything he said could be used against him. Appellant did not object that this testimony violated his Sixth Amendment right to counsel. Therefore, appellant has not preserved his contention concerning a violation of his right to counsel. *Spence v. State,* 795 S.W.2d 743 (Tex.Cr.App. 1990); *Gardner v. State,* 733 S.W.2d 195 (Tex.Cr.App. 1987). See also *Thompkins v. State,* 774 S.W.2d 195 (Tex.Cr.App. 1987); *Pyles v. State,* 755 S.W.2d 98 (Tex.Cr.App. 1988); *Granviel v. State,* 723 S.W.2d 141 (Tex.Cr.App. 1986). Point of error four is overruled.

Appellant's claim in points two and three that his Fifth Amendment rights were violated by McNeel's and Allen's testimony at the punishment phase of trial requires a determination of two issues: first, whether appellant waived his Fifth Amendment rights by his

assertion of an insanity defense at guilt/innocence phase; and, second, if he did so waive his Fifth Amendment rights as to this psychiatric testimony at the guilt/innocence phase regarding insanity, whether that waiver extends to the punishment phase and the issue of future dangerousness under Article 37.071 (b) (2), V.A.C.C.P.

The trial court ordered the examinations for competency and insanity at appellant's request. Appellant did not waive his Fifth Amendment privilege merely by requesting appointment of a court-appointed psychiatrist and psychologist and submitting to a competency and sanity examination. *Hernandez v. State*, 805 S.W.2d 409 (Tex.Cr.App. 1990); *Powell v. State*, 742 S.W.2d 353 (Tex.Cr.App. 1987), vacated and remanded 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 926 (1988) aff'd 767 S.W.2d 759 (Tex.Cr.App. 1989) revs'd 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989); *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981).

In *Smith* the Supreme Court held that because the defendant was not informed that what he said during the competency examination could be used against him at the punishment phase of trial on the issue of future dangerousness, his Fifth Amendment rights were violated. The Court left open the issue of the admissibility of such compelled testimony in response to a defendant's assertion of the insanity defense or to a defendant's use of psychiatric evidence in his own behalf on the issue of future dangerousness.

In *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), the Supreme Court addressed the issue left open in *Smith* concerning the State's use of

psychiatric testimony for rebuttal purposes when the defendant has initiated the use of psychiatric evidence. In *Buchanan* defense counsel joined with the prosecutor in a motion for involuntary hospitalization of the defendant for treatment of mental illness. At trial the defendant attempted to establish the affirmative defense of "extreme emotional disturbance," relying on psychological reports and letters. In response the prosecutor introduced part of a report made by a doctor concerning his observations about the defendant's mental state when the defendant was involuntarily hospitalized. The defendant objected that this violated his Fifth and Sixth Amendment rights.

Relying on language in *Smith,* the Court stated:

> [I]f a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution. [Citations omitted]

Id., 483 U.S. at 422-423, 107 S.Ct. 2917-2918, 97 L.Ed.2d at 355. The Court noted this report did not describe any statements made by the defendant dealing with the offenses for which he had been charged. The Court concluded that use of such a report for "this limited rebuttal purpose" was not a Fifth Amendment violation. *Id.*, 483 U.S. at 424, 107 S.Ct. at 2918, 97 L.Ed.2d at 356.

The above quoted language in *Buchanan* controls appellant's argument that he had not waived his Fifth

Amendment rights at the guilt/innocence phase by introducing evidence in support of his insanity defense. We hold, in accord with *Buchanan,* that it was not a violation of appellant's Fifth Amendment privilege for the State to rebut appellant's presentation of an insanity defense at the guilt/innocence stage with testimony from the experts who had examined appellant on that issue at his request.

Appellant also argues a more narrow basis for finding no waiver of his Fifth Amendment privilege at the guilt/innocence phase despite his presentation of an insanity defense. He relies upon a case from this Court, *Powell v. State,* 742 S.W.2d 353 (Tex.Cr.App. 1987), vacated and remanded 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 926 (1988), aff'd 767 S.W.2d 759 (Tex.Cr.App. 1989), revs'd 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989), to argue that he had not waived his Fifth Amendment rights concerning the *expert testimony* at the guilt/innocence phase and thus also not at the punishment phase.

Our original opinion in *Powell* addressed the same issue presented by appellant. That issue is whether a defendant's presentation of evidence in support of an insanity defense waives his Fifth and Sixth Amendment rights concerning psychiatric testimony at the guilt/innocence phase of trial and at the punishment phase.

In *Powell* the defendant's Fifth and Sixth Amendment rights were violated under *Smith* by allowing testimony of psychiatric and psychological examinations without

informing him of his *Miranda*[1] rights and without notifying counsel in advance that the examinations would encompass the issue of future dangerousness. The experts were permitted, over objection, to testify for the State in rebuttal at the guilt/innocence phase regarding the issue of insanity, after the defendant had introduced evidence in support of an insanity defense. They also testified at the penalty stage of the trial on the issue of future dangerousness. This Court stated that "once the defendant has argued the affirmative defense of insanity by use of testimony from a mental health expert, the Fifth Amendment privilege accompanying any psychiatric testimony has been waived." *Id.* 742 S.W.2d at 358. We held the defendant had waived both his Fifth and Sixth Amendment rights at the guilt/innocence phase in terms of the State's use of the expert testimony to rebut his defense of insanity; and he also waived those rights at the punishment phase in terms of the State's use of the expert testimony on the issue of future dangerousness.[2]

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] The United States Supreme Court disagreed with this Court's analysis of the Fifth and Sixth Amendment violations, stating they were "conflated." The Supreme Court discussed the difference between the Fifth and Sixth Amendment, addressed only the Sixth Amendment violation, and held that evidence of future dangerousness was taken in violation of the defendant's Sixth Amendment right to assistance of counsel. The Court specifically noted that it was not addressing the issue of whether a waiver of the right to object to psychiatric testimony at the guilt/innocence phase of a capital murder trial also extends to the sentencing phase. *Powell*, 492 U.S. at 683, n. 2, 109 S.Ct. at 3149 n. 2, 106 L.Ed.2d at 555, n. 2. *This note suggests that this issue of waiver as it relates to the punishment phase issues, based*

Appellant attempts to distinguish our original opinion in *Powell* from his case on the basis of language indicating that a defendant must first present evidence of insanity from a mental health expert before the State may utilize mental health experts in rebuttal. The distinction is incorrect.

Appellant called several doctors and mental health experts who testified they had determined appellant was mentally ill and had temporarily committed him to Rusk State Hospital a couple of times within a span of one and one-half years before the commission of the offense to two and one-half years before. Based upon this expert evidence, appellant's version of his disadvantaged and troubled background, and the facts leading up to and including the offense, appellant argued to the jury that he had proven he was insane at the time he committed the offense. Appellant argues that because he did not call a mental health expert to specifically testify that he was insane at the time of the offense, the State should not have been permitted to rebut his claim by the use of experts. We do not agree that the State must be so limited.

Appellant presented mental health expert testimony in support of his insanity defense. While the experts did not testify specifically that appellant was insane at the time of the offense, their testimony regarding appellant's mental illness was part of the foundation upon which appellant based his defense. Language in *Powell* did not

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upon a defendant's assertion of an insanity defense is still an open question and was not disposed of by our original opinion in Powell. (Emphasis added.) See also *id.*, 492 U.S. at 685-686, n. 3, 109 S.Ct. at 3150, n. 3, 106 L.Ed.2d at 557, n. 3.

condition admission of expert testimony in rebuttal on a defendant's expert's statement that defendant was insane at the time of the offense. "[O]nce the defendant has argued the affirmative defense of insanity by use of testimony from a mental health expert, the Fifth Amendment privilege accompanying any psychiatric testimony has been waived." *Id.*, 742 S.W.2d at 358. In the instant case appellant used expert testimony to support his defense. In this context, even under *Powell*, the State's use of experts in rebuttal was proper. Further, language in *Smith* and *Buchanan* indicates that if a defendant introduces psychiatric evidence in some form, the State may also introduce psychiatric evidence in some form. *Smith*, 451 U.S. at 465-466, 101 S.Ct. at 1874, 68 L.Ed.2d at 370; *Buchanan*, 483 U.S. at 422, 107 S.Ct. at 2917, 97 L.Ed.2d at 355. Therefore, appellant's Fifth Amendment privilege was not violated at the guilt/innocence phase by the State's use, in rebuttal, of testimony by Allen and McNeel concerning appellant's insanity.

This brings us to the more difficult issue of whether appellant's waiver of his Fifth Amendment rights by presentation of evidence in support of an insanity defense at the guilt/innocence phase extends to the experts' testimony concerning future dangerousness at the punishment phase when appellant did not present any such psychiatric testimony at punishment.

In *Smith* the Supreme Court stated that a defendant's Fifth Amendment privilege was implicated at the punishment phase on the issue of future dangerousness. 451 U.S. at 466-469, 101 S.Ct. at 1874-1876, 68 L.Ed.2d at 371-373. Future dangerousness is a critical issue and one on which the State has the burden of proof beyond a reasonable

doubt. See Article 37.071(b)(2) and (c), V.A.C.C.P. It is an "element" which the State must prove to obtain the death penalty and is an entirely different and separate issue from insanity. Appellant's request and consent to an examination for sanity did not put him on notice that what he said would be used in another context and at another proceeding – the issue of his future dangerousness at the punishment phase. He was not given *Miranda* warnings. Does such lack of notice and lack of waiver by appellant at the punishment phase also violate appellant's Fifth Amendment rights at the punishment phase? Texas and United States Supreme Court cases indicate that it does.

In *Brumfield v. State,* 445 S.W.2d 732 (Tex.Cr.App. 1969), a non-capital case, this Court explained the relatively new bifurcated trial procedure in which guilt/innocence was a separate proceeding from punishment.[3] We concluded:

> If Article 37.07, V.A.C.C.P., can be interpreted as providing two separate proceedings then it follows that a defendant's waiver of his privilege against self-incrimination by taking the stand at the guilt stage is limited to that particular proceeding.

Id., at 741. Thus, a defendant has a Fifth Amendment privilege at each phase, the guilt/innocence phase and at the punishment phase.

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[3] Although *Brumfield* was a plurality opinion as to rationale, a majority of this Court has embraced the holding. See *Beathard v. State,* 767 S.W.2d 423 (Tex.Cr.App. 1989); *Nelson v. State,* 765 S.W.2d 401 (Tex.Cr.App. 1989); *Brown v. State,* 617 S.W.2d 234 (Tex.Cr.App. 1981).

Waiver of that privilege at the guilt/innocence phase does not extend to the punishment phase. See *Beathard v. State,* 767 S.W.2d 423 (Tex.Cr.App. 1989), in which we held a defendant in a capital murder trial was entitled to have a "no-adverse inference" instruction given to the jury at the punishment phase when the defendant testified at the guilt/innocence phase but not at punishment phase. See *Brown v. State,* 617 S.W.2d 234 (Tex.Cr.App. 1981), in which this Court held a defendant in a non-capital case was entitled to have a "no-adverse inference" instruction given to the jury at the punishment phase even though such instruction had been given at the guilt/innocence phase. *Brown* and *Beathard* are based on the principle that a defendant has a separate and distinct Fifth Amendment privilege against self-incrimination at the punishment phase.

These cases together with the recognition in *Smith* of a Fifth Amendment privilege at the punishment phase on the issue of future dangerousness, demonstrate that a defendant has a separate Fifth Amendment privilege at the punishment phase of a capital murder case which is not waived by his testifying at guilt/innocence. Therefore, appellant's waiver of his Fifth Amendment privilege at the guilt/innocence phase concerning psychiatric testimony on the issue of sanity did not carry over to the punishment phase. Under the dictates of *Smith* such psychiatric testimony would not have been admissible at the guilt/innocence phase absent appellant's waiver in that proceeding; likewise, it was not admissible at the punishment phase on the issue of future dangerousness absent some waiver by appellant. See *Hernandez v. State,* 805

S.W.2d 409, 411-412 (Tex.Cr.App. 1990); *Griffin v. State*, 665 S.W.2d 762, 769 (Tex.Cr.App. 1983).

Three cases from the United States Supreme Court strongly suggest that admission of psychiatric testimony at the punishment phase, in particular concerning the issue of future dangerousness, requires a separate waiver or warning. *Smith* instructs that a defendant must be informed that what he says could be used against him at the punishment phase of a capital murder trial. The Supreme Court noted that if, *upon being adequately warned*, a defendant decided not to answer the doctor's questions, the sanity and competency examinations could still proceed upon the condition that the results could only be used for sanity and competency purposes. The State would have to find some other way to prove future dangerousness. *Id.*, 451 U.S. at 468-469, 101 S.Ct. at 1876, 68 L.Ed.2d at 372-373.

In *Buchanan*, the Supreme Court emphasized that the Fifth Amendment was not violated by admission of psychiatric or psychological evidence for a "limited rebuttal purpose." See *id.*, 483 U.S. at 425, n. 21, 107 S.Ct. at 2919, n. 21, 97 L.Ed.2d at 357, n. 21. It therefore follows that when such evidence is admitted to prove one of the special issues upon which the State bears the burden of proof, it will violate the Fifth Amendment unless it is restricted to rebuttal.

Finally, in *Powell*, the Supreme Court discussed the Sixth Amendment violation caused by failure to notify counsel concerning the scope or intended use of the psychiatric examination. The Court then cited *Buchanan* and stated that even if counsel had notice that raising a

mental-status defense might open the door to the State's use of psychological evidence in rebuttal, he would not anticipate any other use. The Court stated, "Nothing in *Smith,* or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial." *Id.*, 492 U.S. at 685-686, n. 3, 109 S.Ct. at 3150, n. 3, 106 L.Ed.2d at 557, n. 3. That is exactly the situation presented in the instant case.

In the instant case the examining doctors did not inform appellant that what he said could be used against him in court and, in particular, at the punishment phase of his trial. His waiver of his Fifth Amendment privilege by presentation of an insanity defense, was limited to that proceeding at the guilt/innocence phase. *Brumfield,* supra. The State could only use the psychiatric testimony in rebuttal at the guilt/innocence phase. See *Buchanan,* supra. The State cannot use an expert who has examined the defendant for sanity and competency to testify to future dangerousness on the basis of that examination absent a defendant's waiver of his Fifth Amendment privilege at the punishment phase.

Although we find appellant waived his Fifth Amendment privilege at the guilt/innocence phase on the issue of sanity, we hold that waiver was limited to the guilt/innocence phase. See *ibid.* Because appellant was not given any warnings as required by *Smith,* his Fifth Amendment privilege against self-incrimination was violated by McNeel and Allen's testimony at the penalty phase concerning his future dangerousness.

McNeel and Allen were the only witnesses to testify for the State at the punishment phase. Given the error in the admission of their testimony, we must determine whether this testimony on the issue of appellant's future dangerousness contributed to the jury's answers to the special issues. Each doctor's specific testimony on appellant's lack of remorse elucidates this point since remorse, or lack of, was a subject matter they addressed only in the punishment phase; it therefore went beyond the issues of sanity and competency which were the sanctioned reasons for the doctors' interviews and subsequent testimony at the guilt/innocence phase.

Both doctors testified based upon their interviews that appellant showed no remorse for his actions. Dr. Allen's relevant testimony stated:

> . . . [W]hen he finds out that he was in fact mentally ill and did something which he ordinarily would not do, . . . something that was awful, he expresses grief. He expresses remorse. My concern was that the subject, number one, was lucid while I talked to him, number two, there was no such remorse. . . . There wasn't one word spoken along those lines.

Dr. McNeel's relevant testimony, in answer to the inquiry of whether during the course of the interview with appellant how he responded to whether he would do this again, stated:

> Well, he paused and hesitated for some time, I suppose some thirty seconds as though he was reflecting on it, and finally he said — as I recall, he said, . . . 'I guess I wouldn't do it again,' and the [sic] went on to discuss some other topic.

The above testimony was a product of the Fifth Amendment privilege violation and should not have been given at the punishment phase. Given the admission of such testimony, it is impossible to conclude that the jury was convinced of appellant's future dangerousness without the aid of same. There being no showing otherwise, we cannot find beyond a reasonable doubt that this expert testimony did not contribute to the jury's answers to the special issues. See *Satterwhite v. Texas,* 487 U.S. 1230, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). Accordingly, appellant's conviction is reversed and the cause is remanded to the trial court.

OVERSTREET, JUDGE

(Delivered June 10, 1992)
EN BANC
PUBLISH

Miller & White, JJ., dissent

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

November 4, 1992

7TH DISTRICT COURT-7-87-24

RE: Case No. 70,136
STYLE: Wilkins, James Joseph, Jr.

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: JACK SKEEN JR
CRIMINAL DISTRICT ATTORNEY
403 SMITH COUNTY COURTHOUSE
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App. 16

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Supreme Court, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-1318

In The

Supreme Court of the United States

October Term, 1992

THE STATE OF TEXAS,

Petitioner,

v.

JAMES JOSEPH WILKENS, JR.,

Respondent.

Petition For Writ Of Certiorari To The Court Of Criminal Appeals For The State Of Texas

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CONSTITUTION

U.S. CONST. amend. V 3, 4

U.S. CONST. amend. VI 3

STATEMENT OF THE CASE

Respondent agrees with Petitioner's Statement of the Case with the exception of the following material fact omissions:

At sentencing the State called Dr. Tynus McNeel. (SF-XXXIII-12) He testified that the Respondent did not agree to waive his privilege against self-incrimination. (SF-XXXIII-14) He testified that he did not advise the Respondent of a possibility that he would testify at a punishment hearing as to whether he would receive the death penalty nor obtain a waiver of self-incrimination from the Respondent specifically for such testimony. (SF-XXXIII-15) Dr. McNeel subsequently testified ". . . . I feel that there definitely is a probability of future acts of violence in a person like this." He further testified the "probability" was "strong", ". . . . maybe a moderately high to high probability." (SF-XXXIII-29)

Dr. Thomas Allen testified at the sentencing hearing that he did not advise the Respondent that he had the right to remain silent or that it was possible that statements he made would be used against him in a punishment hearing on the issue of future dangerousness. (SF-XXXIII-74) He told the Respondent that the purpose of the ". . . . evaluation was to determine his sanity and competency to stand trial. . . . " (SF-XXXIII-73,74) Thereafter Dr. Allen testified ". . . . that there is a probability that he will continue to be a threat to society to commit criminal acts." "I think that he is a high probability – at high probability." (SF-XXXIII 79) He further testified that Respondent's ". . . . chances for rehabilitation" were "minimal". (SF-XXXIII-88) He testified ". . . . that there is

a probability that he is going to be a continued threat with regard to criminal acts of violence toward society." (SF-XXXIII-114)

SUMMARY OF ARGUMENT

This Court should deny the Petition for Writ of Certiorari because the Texas Court of Criminal Appeals holding in the case at bar was based upon *Estelle v. Smith,* 101 S.Ct. 1866 (1981) and certain Texas Court of Criminal Appeals precedents, not upon a misapplication of this Court's holding in *Buchanan v. Kentucky,* 107 S.Ct. 2906 (1987).

Petitioner's Petition should be denied for the additional reason that given the fact situation presented in the case at bar the analysis conducted by the Texas Court of Criminal Appeals was in accord with the principles laid down by this Court in *Satterwhite v. Texas,* 486 U.S. 249 (1988) and *Chapman v. California,* 386 U.S. 18 (1967) and the harmless error rule was properly applied in the decision of the Texas Court.

ARGUMENT

1. THE TEXAS COURT OF CRIMINAL APPEALS DID NOT MISAPPLY THIS COURT'S HOLDING IN *BUCHANAN v. KENTUCKY* WHEN IT HELD THAT A CRIMINAL DEFENDANT DOES NOT WAIVE HIS FIFTH AMENDMENT RIGHT TO SILENCE WITH RESPECT TO THE ADMISSION OF PSYCHIATRIC TESTIMONY CONCERNING FUTURE DANGEROUSNESS DURING THE PUNISHMENT STAGE OF A BIFURCATED CAPITAL MURDER TRIAL WHEN HE REQUESTS PRE-TRIAL PSYCHIATRIC EXAMINATIONS AND PRESENTS TESTIMONY IN SUPPORT OF HIS CLAIM DURING THE GUILT/INNOCENCE STAGE OF THE TRIAL.

The defendant-petitioner in *Buchanan v. Kentucky,* 107 S.Ct. 2906 (1987), was prosecuted for non-capital murder. The pertinent question raised was whether the admission of evidence from a psychiatric examination of the petitioner offered for the sole purpose of rebutting psychological evidence introduced by the petitioner in his attempt to establish an affirmative mental-status defense, violated his Fifth (and Sixth) Amendment rights. The Court held that when a defendant requests a psychological examination or presents psychiatric evidence the prosecution may present the report of the requested examination to rebut such presentation without implicating the defendant's privilege against self-incrimination.

The Texas Court of Criminal Appeals held that Respondent's Fifth Amendment privilege was not violated at the guilt/innocence phase of his capital murder trial by the prosecution's use, in rebuttal, of testimony by Drs. McNeel and Allen in regard to his insanity. *Wilkens v. State,* (Petitioner's Appendix "A") at 9. In so holding that

Court relied primarily on *Buchanan v. Kentucky. Wilkens, supra* at 4-9. In so doing the Texas Court did not misapply the Court's holding in *Buchanan.*

The Texas Court of Criminal Appeals reversed the Respondent's conviction because his Fifth Amendment privilege against self-incrimination was violated by the testimony of Drs. McNeel and Allen at the penalty phase concerning his future dangerousness. *Wilkens, supra* at 13. The Texas Court's decision was predicated primarily on *Estelle v. Smith,* 101 S.Ct. 1866 (1981) in which this Court recognized a Fifth Amendment privilege at the punishment phase on the issue of future dangerousness, together with a group of Texas Court of Criminal Appeals precedents. *Wilkens, supra* at 9-12. The Court's holding in *Buchanan* is again referred to and some language from *Powell v. Texas,* 109 S.Ct. 3146 (1989) which dealt with a Sixth Amendment violation was included:

> "Nothing in *Smith,* or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial." *Id.* at 3150, n. 3. *Wilkins, supra* at 13.

No basis can be found for Petitioner's assertion that the Texas Court of Criminal Appeals misapplied this Court's holding in *Buchanan v. Kentucky,* in reaching its decision in the case at bar. Therefore, it is the contention of Respondent that Petitioner's assertion in its Writ regarding a misapplication of this Court's holding in *Buchanan v. Kentucky* is without merit and does not require any additional argument from Respondent.

2. THE TEXAS COURT OF CRIMINAL APPEALS DID NOT MISAPPLY THE HARMLESS ERROR ANALYSIS OF *CHAPMAN V. CALIFORNIA* AND *SATTERWHITE V. TEXAS* IN CONCLUDING THAT IT COULD NOT FIND BEYOND A REASONABLE DOUBT THAT THE EXPERT TESTIMONY DID NOT CONTRIBUTE TO THE JURY'S ANSWERS TO THE SPECIAL ISSUES.

In its Petition Petitioner acknowledges that this Court has noted in *Satterwhite v. Texas,* 486 U.S. 249 (1988), that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected the capital sentencing jury, and that the harmless error rule requires the reviewing court to be able to find beyond a reasonable doubt that the constitutional error did not contribute to the verdict. Petitioner then takes exception to the Texas Court's judgment upon the matter and proceeds to attack the *Satterwhite* opinion describing it as an aberration and an anomaly. Petitioner then calls upon this Court to change the standard for determining harmless error.

It thus appears that the alleged "misapplication" of the harmless error rule enunciated in *Chapman v. California,* 386 U.S. 18 (1967) and *Satterwhite v. Texas, supra,* by the Texas Court of Criminal Appeals in the case at bar in reality relates to Petitioner's dissatisfaction with the holdings of this Court in these cases and the Texas Court's adherence to the principles of law set forth therein.

Unlike *Satterwhite* in which a considerable amount of evidence was introduced by the State at sentencing in addition to that of the psychiatrist, in the case at bar Drs. McNeel and Allen were the only witnesses to testify for

the State at sentencing, *Wilkens, supra* at 14. Following a discussion of the content of their testimony the Texas Court found it to be impossible to conclude the jury was convinced of Respondent's future dangerousness without the aid of the same. *Wilkens, supra* at 15. The opinion then went on to state as follows:

> "There being no showing otherwise, we cannot find beyond a reasonable doubt that this expert testimony did not contribute to the jury's answers to the special issues." *Wilkens, supra* at 15.

Petitioner argues that the evidence properly admitted at the guilt phase of the trial was ample to sustain the verdict. However, *Chapman* teaches that this is not the question – the question being whether the State proved "'. . . . beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *Chapman,* 386 U.S., at 24, 87 S.Ct. at 828." *Satterwhite, supra* at 1798.

No basis can be found for Petitioner's assertion that the Texas Court of Criminal Appeals misapplied the harmless error analysis of *Chapman* and *Satterwhite* in concluding that it could not find beyond a reasonable doubt that the testimony of Drs. McNeel and Allen did not contribute to the jury's answer to the special issue of future dangerousness. Therefore, it is the contention of Respondent that Petitioner's assertion in its Writ regarding misapplication of *Chapman* and *Satterwhite* by the Texas Court of Criminal Appeals in without merit and does not require any additional argument from Respondent.

CONCLUSION

For the reasons presented above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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